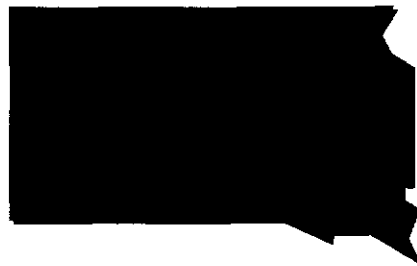


Report of the

2012 SOUTH DAKOTA COMMISSION

ON CHILD SUPPORT



Presented to

Governor Dennis Daugaard

December 2012

Report of the

South Dakota Commission on Child Support

**This report is respectfully submitted to
Governor Dennis Daugaard by the
South Dakota Commission on Child Support
Established by Executive Order No. 2012-02**

Chair

Judge Patricia C. Riepel

Members

**Mr. Rick Cronin
Ms. Margaret Gillespie
Representative Brian Gosch
Senator Ried Holien
Referee Thomas Lee
Mrs. Gloria Miller
Ms. Gail Stoltenburg**

Members of the South Dakota Commission on Child Support

Mr. Rick Cronin, Ft. Pierre, is a noncustodial parent.

Ms. Margaret Gillespie, of Alcester, is an attorney with a general practice including family law. She serves as a member of the State Bar of South Dakota Family Law Committee. She also serves on the board of South Dakota Voices for Children, a nonprofit organization advocating for South Dakota children. She served in the South Dakota State Legislature from 2001-2010.

Representative Brian Gosch, of Rapid City, represents the 32nd District, which includes Pennington County. He is a member of the House Local Government Committee and a member of the House Transportation Committee.

Referee Thomas Lee, of Pierre, is an attorney in private practice and also serves as a child support referee on behalf of the Unified Judicial System.

Mrs. Gloria Miller, of Pierre, is a custodial parent.

Senator Ried Holien, of Watertown, represents the 5th District, which includes Codington County. He serves as Vice Chairperson to the Senate Local Government Committee and is a member of the Senate Health and Human Services Committee.

Judge Patricia C Riepel of Sioux Falls, is a Circuit Court Judge for the Second Judicial Circuit representing the Judiciary. She was a member of the 2004 SD Commission on Child Support.

Ms. Gail Stoltenburg of Pierre, is the Division Director for the Division of Child Support within the Department of Social Services.

**STATE OF SOUTH DAKOTA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER 2012-02**

WHEREAS, Section 667 of Title IV-D of the Social Security Act and Section 25-7-6.12 of the South Dakota Codified Laws requires the state to establish a State Commission on Child Support every 4 years to review the child support guidelines; and,

WHEREAS, It is deemed necessary and in the best interest of the state of South Dakota to review the provisions of the Paternity Proceedings in Chapter 25-8 and related sections of South Dakota Codified Laws that provide for paternity determinations, presumptions, and disestablishment proceedings; and,

WHEREAS, It is deemed necessary and in the best interest of the state of South Dakota to consider provisions that provide courts discretion and authority to allow child support arrearages owed to a parent whose parental rights are being terminated to become a debt due the child; and,

WHEREAS, Section 1-32-4.1 of the South Dakota Codified Laws provides that the governor "May create such advisory councils, committees, boards or commissions as may be deemed necessary and in the best interest of the state of South Dakota..."; and,

WHEREAS, It is deemed necessary and in the best interest of the state of South Dakota to establish a commission to conduct a review of the provisions of Chapter 25-7 of the South Dakota Codified Laws:

IT IS, THEREFORE, BY EXECUTIVE ORDER, Directed that the South Dakota Commission on Child Support is established and authorized to function in compliance with the following sections of this order.

GENERAL PROVISIONS

Section 1. The name of the commission is the South Dakota Commission on Child Support.

Section 2. The Governor of South Dakota shall appoint as many members as he deems necessary to fulfill the goals of the commission. Members shall serve at the pleasure of the governor. The commission membership shall include, but not be limited to, one or more representatives of the following:

- 1) noncustodial parent;
- 2) custodial parent;
- 3) the South Dakota Judiciary;
- 4) the South Dakota Department of Social Services; and
- 5) a member in good standing of the South Dakota State Bar.

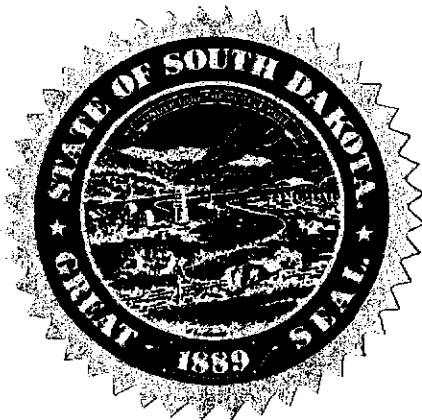
Section 3. The Speaker of the South Dakota House of Representatives and the President Pro Tern of the Senate shall meet and designate a member from each chamber of the South Dakota State Legislature to participate on the commission.

Section 4. The South Dakota Commission on Child Support shall conduct a review of the: support obligation laws as required by Section 25-7-6.12 of the South Dakota Codified Laws; provisions for paternity determinations, presumptions, and disestablishment proceedings in Chapter 25-8 and related sections; and South Dakota Codified Laws related to child support arrearages owed to a parent whose parental rights are being terminated; and submit a report to the governor and the legislature no later than December 31, 2012.

Section 5. The South Dakota Commission on Child Support shall be administered by the Department of Social Services. Expenses of the members to attend meetings shall be paid by the Department of Social Services.

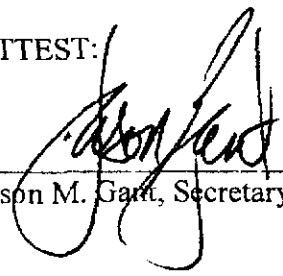
Section 6. The South Dakota Commission on Child Support shall dissolve and cease to exist upon completion of its report to the governor and the legislature.

Dated at Pierre, South Dakota, this Third day of February, 2012.




Dennis Daugaard, Governor of South Dakota

ATTEST:


Jason M. Gant, Secretary of State

INTRODUCTION

This report is issued in response to Governor Dennis Daugaard's Executive Order 2012-02.¹

HISTORY

The South Dakota child support guidelines were originally based on the findings and recommendations of the first Commission of Child Support, which was established in 1985. Among those recommendations approved by the 1986 Legislature, SDCL 25-7-6.12 required that a commission on child support review the guidelines every four years. Six commissions have convened since that time. The Legislature has approved the findings and recommendations of the 1988, 1996, 2000, 2004, and 2008 Commissions. In 2000, the federal government has also enacted rules requiring review of the guidelines every four years.²

COMPOSITION

The 2012 Commission reflects a wide range of stakeholders, including individuals with professional experience applying the guidelines and others who are affected by the guidelines. The composition of the Commission fulfills the Executive Order requirement for two State legislators, one member from the House of Representatives and one member from the Senate, and at a minimum, a noncustodial parent, a custodial parent, a representative of the South Dakota Judiciary, a representative of the South Dakota Department of Social Services, and a member in good standing of the South Dakota State Bar. The Department of Social Services (DSS) administers the Commission. The Commission dissolves and ceases to exist upon completion of its report to the Governor and the Legislature.

¹ Executive Order 2012-02

² Title 45, Public Welfare, CFR 302.56.

PROCEEDINGS

The Commission held three public hearings across the State in Pierre/Aberdeen on June 11, Rapid City on July 2, and Sioux Falls on August 13. The locations and times of the public hearings were publicized by paid advertisements in local newspapers, public service announcements on the radio, the DSS website, and the State Bar Association newsletter. Individuals were encouraged to submit written comments that were disseminated to the entire Commission for consideration.

The Commission broadened its experience base through public hearings in which oral testimony was heard and through written comments received and submitted by the DSS Division of Child Support, the judiciary, child support referees, the Family Law Section of the State Bar Association, and individual Commission members. The Commission also considered appellate court decisions and relevant laws of other states. In addition, Legal Counsel for the Division provided the Commission with a wealth of information about paternity determinations, presumptions and disestablishment proceedings. This included relevant case law and recent case trends, paternity disestablishment provisions in other states, federal requirements of state paternity provisions, frequency of cases with paternity issues, and other information. Legal Counsel also researched the laws of other states on several other issues at the request of the Commission, such as the treatment of child support arrears in cases in which the parental rights of the custodian are terminated. The Division also compiled relevant data from its automated system (e.g., number of orders based on guidelines deviations) for the Commission to consider in its recommendations. In addition, the Division retained economist Dr. Jane Venohr, an expert in child-rearing costs and child support guidelines, to provide economic data on the cost of raising children and to provide other information to help the Commission assess the appropriateness of the current schedule. Dr. Venohr provided numerous briefing materials to the Commission on the costs of raising children, other relevant economic data, and information about other states' guidelines.

The Commission met seven times to discuss the findings from the information provided in order to make recommendations. The meetings occurred on May 8, June 11,

July 2, August 13, September 27, November 15, and December 5. Individual Commission members drafted proposed changes pertaining to specific issues that were then reviewed by the Commission as a whole. The draft proposals and changes thereto evolved into a recommendation supported by the majority of the Commission.

Although the Commission focused on reviewing SDCL Chapters 25-7 and 25-8, which pertain to the guidelines and paternity provisions, the Commission recommended numerous legislative changes that affect other Chapters and Sections of Title 25, Domestic Relations. The recommended changes affect other Chapters and Sections because some of the recommendations that address the charges of the Commission required cross-referencing and conforming changes to other sections of statute of the Code.

Most of the remainder of this report discusses the Commission's recommendations. A summary is first provided followed by a detailed discussion of specific recommendations. The final section of this report identifies other issues addressed by the Commission that did not result in a recommended legislative change.

SUMMARY OF RECOMMENDATIONS

The Commission's recommendations are summarized in Table 1. The recommendations are organized into four subcategories: guidelines recommendations, recommendations regarding paternity disestablishment proceedings, recommendations regarding child support arrearages owed to a parent whose parental rights are being terminated, and recommendations for other statutes that relate to the first three issues. Appendix A contains a mark-up of the recommended changes to statute.

| Table 1 Summary of Recommendations | |
|---|---|
| Recommendations specific to the guidelines | |
| 1. | Make no changes to the child support schedule in SDCL 25-7-6.2. |
| 2. | Amend SDCL 25-7-6.16 to clarify that medical insurance cost is that parent's <i>prorated</i> share of the child's medical insurance cost, not the total cost of the child's medical insurance. |
| 3. | Amend SDCL 25-7-6.26 so that if a parent fails to furnish financial information in a child support establishment or modification proceeding, if good cause is shown, the support obligation may be set at an amount lower than the computation of support using the South Dakota annual pay standard. |
| 4. | Clarify and strengthen SDCL 25-7-7.3 to provide that any previously ordered support payments that have become due, whether paid or unpaid, cannot be modified for periods prior to the date of notice of the modification hearing. |
| Recommendations regarding paternity determinations, presumptions, and disestablishment proceedings | |
| 5. | Create a new section SDCL 25-8 that allows the court to find that a presumed or legally determined father is not the biological father of a child based on genetic test results. The court may set aside the paternity presumption if it finds that is in the best interest of the child. |
| 6. | Make conforming changes to SDCL 25-8-7.1 and SDCL 25-8-9 so that they apply to disestablishment proceedings as well as proceedings to establish paternity. |
| 7. | Expand SDCL 25-8-57 to also provide that a potential biological father of the child has standing to file an action to rebut the presumption. The presumption cannot be rebutted without genetic test results. |
| 8. | Create a new section in SDCL Chapter 25-7 that automatically terminates a child support order upon entry of the paternity disestablishment order. It also clarifies responsibility for any child support accrued prior to entry of the disestablishment order. |
| Recommendations regarding child support arrearages owed to a parent whose parental rights are being terminated | |
| 9. | Amend SDCL 25-5A-18, SDCL 25-6-17 and SDCL 26-8A-27 to clarify that any existing child support arrearages shall be addressed by the court in any proceeding for termination of parental rights. |

Recommendations for related sections

10. Replace "mother" with "custodian," "father" with "noncustodial parent" and "spouse" with "custodian." These substitutions are recommended in SDCL 25-7A-1, SDCL 25-7A-3, SDCL 25-7A-4, SDCL 25-7A-5, SDCL 25-7A-21.1, and SDCL 25-8-5.
11. Amend SDCL 25-7A-20 to clarify that the department will enforce a spousal support obligation only if it is court-ordered, the department is also enforcing a child support obligation for the same spouse, and the spouse lives with the dependent child.
12. Amend the definition of "date of hire" in SDCL 25-7A-1 to comply with federal regulations.
13. Amend SDCL 25-7A-56.7, which establishes due process requirements in any subsequent child support enforcement actions, to clarify that it also applies to any subsequent child support *modification* actions.
14. Create two new sections in SDCL 25-7A that address due process protections in child support modification actions. One section requires each parent to notify the Division of Child Support of his or her current address, the name and address of the parent's employer, and any address or employment changes. The other section provides that a child support referee may mail notices to the parent's last known address on file with the Division.
15. Create two new sections in SDCL 25-7A that address discovery in referee proceedings. One section provides that the parties shall provide all required financial and legal documents at least five days prior to the hearing date. The other section provides that the parties may inspect and obtain copies of financial documents, that the information is confidential, and that the referee may charge copying fees not to exceed \$0.25 per page.

DETAILED ANALYSIS OF RECOMMENDATIONS

Recommendation 1. Make no changes to the child support schedule in SDCL 25-7-6.2

Issue. Federal regulation requires states to review economic data on the cost of child rearing as part of a state's guidelines review; and, if appropriate update the guidelines.

Discussion. The existing schedule is based on economic data available in 2008. The Commission reviewed a considerable amount of economic data including data from the most current, credible studies of child-rearing expenditures.³ It also reviewed economic data on the changes in total household expenditures, income, and price levels since 2008. Total household expenditures, income and price levels declined from 2008 to 2009.⁴ The economy was in an economic recession during all of 2008 and for the first half of 2009. From 2009 to 2010, total household expenditures continued to decline, but there were nominal gains in income and price levels.⁵ After 2010, nominal gains in income and price levels continued, but the trend for total household expenditures is not known because data were not yet available. As of 2012, however, the South Dakota unemployment rate remained 60 percent higher than in 2008 and prices had only increased 4.8 percent since the existing schedule was developed.

The Commission compared and contrasted this information with the most current studies of child-rearing expenditures, which were based on older data. The most current studies are based on expenditure data collected in 2009 or earlier, because of the time it

³ This included the most current Betson-Rothbarth measurements, which form the basis of 29 state guidelines including the existing South Dakota schedule provided in SDCL 25-7-6.2 and the United States of Department of Agriculture measurements. (David M. Betson. 2010. "Appendix A: Parental Expenditures on Children: Rothbarth Estimates," in Judicial Council of California, *Review of Statewide Uniform Child Support Guideline*, San Francisco, California; Mark Lino. 2011. *Expenditures on Children by Families: 2010 Annual Report*, U.S. Department of Agriculture, Center for Nutrition and Policy Promotion. Miscellaneous Publication No. 1528-2010.)

⁴ The percentage decrease in total household expenditures, incomes and price levels was 4.0 percent, 2.2 percent and 0.4 percent, respectively. (Source: Bureau of Labor Statistics, *Table 5: Composition of consumer unit: Average annual expenditures and characteristics*, Consumer Expenditure Survey for married couples with children for various years. Retrieved from <http://www.bls.gov/cex/#tables> on March 6, 2012.)

⁵ Total household expenditures declined 1.6 percent while income and price levels increased 1.1 and 1.6 percent, respectively.

takes to collect, compile and analyze the data. Economic data on *total* household expenditures covers more recent years because it does not require the sophisticated data analysis necessary to separate the child's share of expenditures from the parents' share of expenditures. Because of the time required to develop expenditure data, the most current measurements of child-rearing expenditures may not reflect the post-recession economy. Tracking changes in expenditures and income patterns is especially challenging. Data are not yet available to determine to what extent the drops in total household expenditures, income and price levels from 2008 to 2009 have been offset or sustained to warrant significant changes to the schedule.

The Commission's focus was concentrated upon the low-income end of the schedule. The Commission heard concerns that the South Dakota minimum order amount was too high as it represents a higher percentage of income than the schedule requires at very high incomes. This was balanced, however, by concern was that lowering the schedule would adversely affect families, especially low-income families. The public comment heard by the Commission expressed frustration at high payments and low receipts.

Recommendation Summary. After considering all testimony, the Commission concluded that there was not a clear mandate that the schedule should not be changed.

Recommendation 2. Amend SDCL 25-7-6.16 to clarify that medical insurance costs is that parent's prorated share of the child's medical insurance cost, not the total cost of the child's medical insurance.

Issue. The current provision does not clearly state how the cost of the child's medical insurance shall be considered in determining whether the cost is reasonable to a parent. Some interpret it to mean the total cost of the child's medical insurance when calculating reasonableness. This is inconsistent with SDCL 25-7-6.16 which provides that each parent is only financially responsible for his or her prorated share of the cost of the child's medical insurance.

Discussion. SDCL 25-7-6.16 provides that an order shall address the child's health care needs and how the child's health care needs will be met. The order must require a parent to provide medical insurance coverage if the insurance is accessible for the child and

available to the parent at reasonable cost. Medical insurance is considered reasonable in cost if the cost attributable to the child is equal to or less than eight percent of the parent's net income.

This provision and the definition of "reasonable in cost" insurance were adopted in 2009. The 2008 Commission recommended the definition to address a 2008 federal medical support requirement that states must provide a numeric standard, such as a percentage of income, for determining whether the cost of the child's medical insurance is reasonable. The Commission determined that the numeric standard must be applied to the cost of the child's medical insurance actually apportioned to that parent. As provided in SDCL 25-7-6.16, the actual amount incurred by a parent would be only his or her prorated share of the cost of the child's medical insurance.

Recommendation Summary. Amend SDCL 25-7-6.16 by adding "after proportionate medical support credit is applied" to the sentence describing the calculation of whether the cost of the child's medical insurance is reasonable to a parent.

Recommendation 3. Amend SDCL 25-7-6.26 so that if a parent fails to furnish financial information in a child support establishment or modification proceeding, if good cause is shown, the support obligation may be set at an amount lower than the computation of support using the South Dakota annual pay standard.

Issue. In some cases where a parent fails to furnish income information, there may be information available from another credible source that is more accurate than the annual pay standard. Current statute does not permit the use of this information.

Discussion. The intent of SDCL 25-7-6.26 is to obtain accurate income information so that the support obligation may be determined with reasonable precision. To that end, it encourages a parent to furnish his or her income information by providing that if the parent does not furnish it, that parent's income shall be computed at a rate not less than the most recent annual pay standard as reported by the South Dakota Department of Labor and Regulation. The 2012 annual pay standard is \$35,413 per year. In some cases where income information is not furnished, there may be evidence that the parent's actual income is less than the annual pay standard. For example, quarterly wage data from the

South Dakota Department of Labor and Regulation, which are routinely matched to the Division of Child Support caseload, may provide evidence that the parent's actual income is less than the annual pay standard. Continuing with this example, the recommended amendment would provide that the court could determine the support award based on the parent's quarterly wage data (or other evidence) even though the income is *less* than the annual pay standard, if good cause is shown.

To be clear, the existing provision provides that if the parent does not furnish income information, the court can determine the support award based on the parent's quarterly wage data (or other evidence) if it is *more* than the annual pay standard. The proposed recommendation does not change this; it just gives the court discretion to use evidence that is higher *or lower* than the annual pay standard and directs the court to use the annual pay standard when no evidence is provided.

Recommendation Summary. Amend the provision to allow for court discretion to use an amount lower than the pay standard when good cause is shown.

Recommendation 4. Clarify and strengthen SDCL 25-7-7.3 to reflect its intent.

Issue: The intent of SDCL 25-7-7.3 is that past due support payments are not subject to modification regardless of whether they were paid or unpaid. This intent was recently upheld by the Supreme Court decision in Heumiller v. Heumiller.

Discussion. In Heumiller v. Heumiller, 2012 SD 68, a father with three children petitioned to modify his child support order. He requested that the future order amount be reduced to account for "overpayments" he made after his two older children graduated from high school and reached the age of majority. The Circuit Court concluded that the request would result in a retroactive modification of child support in violation of SDCL 25-7-7.3; therefore, the court denied any reduction based on the amount paid before the petition was filed. The South Dakota Supreme Court concluded that the Circuit Court reached the correct result. While looking at the term "past due support", it can logically be interpreted in multiple ways. The South Dakota Supreme Court concluded that the plain language of SDCL 25-7-7.3 shows that whether the support is paid or unpaid is

immaterial. Further, the Court found that there was indeed an obligation that had accrued.

In light of the recent Supreme Court opinion, the Commission reviewed the language used in the opinion, and seized the opportunity to remove ambiguity in the statute. The Commission also considered whether it could simplify the process by allowing the support to be modified back to the date of filing, but this is precluded by federal regulation that requires the date to be the "notice of hearing" date.

Recommendation Summary. Amend SDCL 25-7-7.3 to clarify its intent. Specifically, clarify that "past due support payments" are indeed an obligation by replacing "past due" with "previously ordered". Also, add "that have become due, whether paid or unpaid." The purposes of the additional verbiage are two-fold. It clarifies that the provision applies to previously ordered support that has become due, rather than support that will become due in the future. It also clearly states that whether the past-due ordered support was actually paid is immaterial.

Recommendation 5. Create a new section to SDCL 25-8 that allows the court to find that a presumed or legally determined father is not the biological father of a child based on genetic test results. The court may set aside the paternity presumption if it finds that is in the best interest of the child.

Issue. Case law, scientific testing availability, and changing social norms have raised concerns regarding the presumption of paternity. Establishing paternity is no longer the challenge it once was. The Commission was obligated to consider the need for statutes to facilitate paternity disestablishment through genetic testing results, as well as enhance the ability of the court to act in the best interest of the child. It was time to review and revise disestablishment proceedings. The brief time period for contesting the rebuttable presumption of paternity could now be reevaluated in light of new methods for determining or disestablishing paternity.

Discussion. Several provisions of SDCL Chapter 25-8 provide for the establishment of paternity by presumption and without genetic test results. For example, SDCL 25-8-52 provides for the rebuttable presumption of paternity when parents voluntarily sign a

paternity affidavit. SDCL 25-8-57 provides the rebuttable presumption of legitimacy to any child born in wedlock or within ten months after dissolution of marriage. Although SDCL 25-8-59 provides for actions contesting the rebuttable presumption of paternity, the window of opportunity is extremely limited, it does not specifically address the consideration of genetic test results, and it does not contemplate setting aside a presumption of paternity in the best interest of the child.

Case law⁶, scientific advances and recent case trends underscore the need for statutes to address paternity disestablishment. Although the individual circumstances of these cases vary, some are common to many Division of Child Support cases.

- Husband and wife separate, but do not divorce because of associated costs, then the wife becomes pregnant by another man.
- Wife becomes impregnated by another man while her husband is incarcerated.
- A man believes he is the biological father so he voluntarily signs the paternity affidavit but later the mother tells him that he is not the biological father.
- A man signs the paternity affidavit knowing that he is not the biological father.

The Division estimates that they see about 15 to 20 of these factual scenarios each year and the actual number of these scenarios is likely to be higher. National statistics corroborate the volume of these cases. One frequently cited statistic is one third of paternity tests exclude the alleged father.⁷ Another frequently cited statistic is the husband is excluded from 10 percent of marital births.⁸

Recent cases also raise the concern of the best interest of the child in paternity disestablishment proceedings. For example, one case consists of a biological father who paid child support and visited his child for several years until the biological mother wanted to decrease visitation despite a home study recommending that the child spend

⁶ Matter of the Support Obligation of Carlos Do Rego, 2001 SD 1, 620 NW2d 770; State ex rel. Wright, v. Byer, 2004 SD 41, 678 NW2d 586; Chapman v. Chapman, 2006 SD 36, 607 NW2d 572; and State ex rel. Wernk v. Cortez, 2010 SD 47, 783 NW2d 852.

⁷ The American Association of Blood Banks (AABB) clarifies the exclusion rate is based on those seeking paternity tests, including cases where the mother alleges several men as possible fathers and unexcluded alleged fathers using genetic testing as part of their defense. AABB further clarifies the exclusion rate does not reflect the percentage of men that are misled into believing they are the father (American Association of Blood Banks, *Annual Report Summary for Testing in 2008*, Retrieved from <http://www.aabb.org/sa/facilities/Documents/rtannrpt08.pdf> on November 26, 2012.)

⁸ A National Institute of Health review of 17 studies actually finds that the paternity discrepancy rate to be 0.8 to 30%, but also discusses the 10% rate. (Bellis, M., et al. 2005. "Measuring paternal discrepancy and its public health consequences," *Journal of Epidemiology and Community Health*. 2005 September; 59(9): 749-54 Retrieved from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1733152/> on November 26, 2012.)

more time with the biological father. The biological mother's husband intervened and was able to assert paternity under SDCL 25-8-57 and eliminate all contact between the biological father and the child. Still, another example involves a case in another state where a man signed a paternity affidavit because the biological mother initially told him that he was the father. The man eventually sought genetic tests because the mother later told him that he was not the father. In turn, he filed a paternity disestablishment action when the genetic test results excluded him as the biological father, but the mother was killed in car accident before the hearing date. The mother had never mentioned any other possible biological fathers. The court upheld the paternity presumption based on the best interests of the child rather than leave the child parentless.

After reviewing various cases, the Commission, with assistance from Division Legal Counsel identified specific issues to consider when drafting statutes: development of a disestablishment process, consideration of the best interest of the child, the appropriate timeframe for paternity disestablishment in general, the appropriate timeframe for paternity disestablishment actions relative to the best interest of the child, judicial discretion in disestablishment proceedings, standing to challenge the presumption of paternity, the constitutionality of any proposed change, and retroactivity on old paternity decisions and return of support paid. With assistance from Division Legal Counsel, the Commission also reviewed disestablishment statutes and the trends in other states as well as federal requirements pertaining to paternity, disestablishment and the Uniform Parentage Act.

All of South Dakota's neighboring states have statutes or provisions that provide for disestablishment. South Dakota's current paternity and genetic testing statutes comply with federal paternity establishment requirements. Federal regulations do not limit disestablishment clauses in general. Specific provisions of a disestablishment clause, such as clauses concerning genetic testing must comply with pertinent federal regulations. The Commission reviewed the list of factors used to consider the best interest of the child in disestablishment proceedings under the Uniform Parentage Act and adopted it with some slight modifications appropriate to South Dakota.

Recommendation Summary. Create a new section to SDCL Chapter 25-8 providing that the court may find that a presumed or legally determined father is not the biological father

of a child based on genetic test results. The new statute would authorize the court to set aside the presumption if it finds that it is in the best interest of the child. The new section also lists the factors that the court may consider in determining the best interest of the child.

Recommendation 6. Make conforming changes to SDCL 25-8-7.1 and SDCL 25-8-9 so that they apply to disestablishment proceedings as well as proceedings to establish paternity.

Issue. The court needs the ability to order genetic testing to comport with Recommendation 5, which facilitates paternity disestablishment. In addition, the cases reviewed for Recommendation 5 indicate a longer time period is needed for initiating paternity disestablishment actions.

Discussion. SDCL 25-8-7.1 provides for court-ordered testing for paternity in any action or proceeding concerning the paternity of the child. SDCL 25-8-9 provides that proceedings to establish paternity may be brought at any time before the eighteenth birthday of the child. In contrast, SDCL 25-8-59 provides 60 days for rebutting the presumption of paternity based on a signed paternity affidavit or three years after the creation of the presumption in cases involving allegations of fraud, duress or material mistake of action. The Commission concluded that a longer timeframe was appropriate, particularly if the intent of Recommendation 5 is to facilitate paternity disestablishment when the presumed father is not the biological father. Case reviews confirm that several years may pass before the presumed father is aware that he may or may not be the biological father of the child.

Recommendation Summary. Expand SDCL 25-8-7.11 and SDCL 25-8-9 to include any action or proceeding concerning paternity disestablishment proceedings.

Recommendation 7. Expand SDCL 25-8-57 to also provide that a potential biological father of the child has standing to file an action to rebut the presumption. The presumption cannot be rebutted without genetic test results.

Issue. Current laws do not provide a potential biological father an avenue for disputing the rebuttable presumption of paternity for a child born in wedlock.

Discussion. SDCL 25-8-57 provides that the rebuttable presumption of legitimacy of a child born in wedlock can be disputed by a husband or wife, but not the potential biological father of the child. Such a provision would conform to the intent of Recommendation 5, which, is to facilitate paternity disestablishment when the presumed father is not the biological father and a potential biological father has reason to believe he is the father.

Recommendation Summary. Expand SDCL 25-8-57, which provides that the rebuttable presumption of legitimacy of a child born in wedlock can be disputed by a husband or wife, to also provide that a potential biological father of the child has standing to file an action to rebut the presumption and to clarify that the presumption cannot be rebutted without genetic test results.

Recommendation 8. Create a new section in SDCL Chapter 25-7 that automatically terminates a child support order upon entry of the paternity disestablishment order. It also clarifies responsibility for any child support accrued prior to entry of the disestablishment order.

Issue. There are currently no statutes that address the termination of the child support order and treatment of any previously ordered child support that accrued in paternity disestablishment cases.

Discussion. There may be previously ordered child support that accrued prior to a paternity disestablishment action. To be consistent with SDCL 25-7-7.3, which provides that previously ordered child support cannot be modified, the proposed provision provides that the disestablished father continues to be responsible for any child support that accrued prior to the date of entry of the disestablishment order. Nonetheless, the majority of the Commission members believed that the provision should clearly identify

that the disestablished parent is not precluded from bringing a separate cause of action for recovery of previously ordered child support.

Recommendation Summary. Create a new section in SDCL Chapter 25-7 providing that the child support order is automatically terminated from the entry of the paternity disestablishment order and clarifying that the disestablished father continues to be responsible for any child support accrued prior to entry of the paternity disestablishment order. The disestablished father is not precluded from filing a separate action for recovery of previously ordered child support.

Recommendation 9. Amend SDCL 25-5A-18, SDCL 25-6-17 and SDCL 26-8A-27 to clarify that any existing child support arrearages shall be addressed by the court in any proceeding for termination of parental rights.

Issue. Whether and how the court should address child support arrearages is not clear in statutes that provide for the termination of parental rights, adoption statutes that address the rights and duties of natural parents, and statutes pertaining to final disposition in child abuse and neglect cases.

Discussion. SDCL 25-5A-18 provides for the termination of parental rights and transfer of parental rights when all the parents and putative fathers consent or waive consent and it is in the best interest of the child. SDCL 25-6-17 addresses the parental duties of the natural parents from the time of adoption. SDCL 26-8A-27 provides that the court may terminate parental rights as part of a final dispositional hearing regarding a child adjudicated to be abused and neglected. In each of these situations, there may be child support arrearages.

The need to address arrears in these situations was brought to the Commission's attention by a Commission member who cited a case in which a custodial father's rights were terminated because he had molested his children. The father was sent to prison. An existing child support arrearage was owed to him from the noncustodial mother. The Commission member believed that this was not morally right although the fact is that had the noncustodial mother paid support timely, as required by statute, there would be no child support arrearage.

The Commission had a lengthy discussion about the intent and limitations of a statute addressing child support arrearages in criminal circumstances and other circumstances in which parental rights are terminated. The majority of the Commission believes that the law should provide that a Judge should address child support arrears in any case resulting in a termination of parental rights. This would require a Judge to entertain a motion; review the facts of the case and supporting statutes provided by the parties; and, then make a ruling on that particular case. The majority of the Commission believes that the law cannot contemplate every circumstance in which parental rights are terminated. With regard to criminal situations, the Commission recognizes that there are mechanisms under current statute to appropriately address arrears in most situations.

Recommendation Summary. Amend SDCL 25-6-17, which addresses the parental duties of the natural parents from the time of adoption, to clarify that any existing child support arrearages shall be addressed by the court in the order terminating parental rights. Amend SDCL 26-8A-27, which provides that the court may terminate parental rights as part of a final dispositional hearing regarding a child adjudicated to be abused or neglected, to clarify that any existing child support arrearages shall be addressed by the court in the order terminating parental rights.

Recommendation 10. Replace “mother” with “custodian,” “father” with “noncustodial parent” and “spouse” with “custodian.” These substitutions are recommended in SDCL 25-7A-1, SDCL 25-7A-3, SDCL 25-7A-4, SDCL 25-7A-5, SDCL 25-7A-21.1, and SDCL 25-8-5.

Issue. The terms, “mother” and “father” are not gender neutral. Other persons besides a spouse may have legal and/or physical custody of a dependent child.

Discussion. The Commission recognizes that the terms used in statute should be gender neutral, not presume that the custodian is or was a spouse, and consistently referenced within the Chapter.

Recommendation Summary. Replace the definition of “spouse” with the definition of “custodian” in SDCL 25-7A-1. Make conforming replacements of “spouse” with “custodian” in SDCL 25-7A-3 and SDCL 25-7A-5. Replace the references to “mother”

and “father” with “custodian” and “noncustodial parent,” respectively, in SDCL 25-7A-4, SDCL 25-7A-21.1, and SDCL 25-8-5.

Recommendation 11. Amend SDCL 25-7A-20 to clarify that the department will enforce a spousal support obligation only if it is court-ordered, the department is also enforcing a child support obligation for the same spouse, and the spouse lives with the dependent child.

Issue. The current provision lacks clarity and precision.

Discussion. There are five issues with SDCL 25-7A-20 that could improve the clarity of its intent. The first issue is when qualifying that the provision requires that the spouse and child be living together, it refers to “his” child rather than the “dependent” child. The second issue is that the term, “support obligation” is used without clarifying whether it is a *child* or *spousal* support obligation. The third issue is that does not recognize that the Department only has the authority to enforce *court-ordered* support and cannot enforce support that is not court-ordered. The fourth issue is that it provides for support from spouses but not from former spouses. The final issue is that it does not recognize that the Department has the authority to enforce spousal support only if there is also a child support order being enforced by the Department and the same party is to receive both spousal support and child support.

Recommendation Summary. Replace “his child” with “the dependent child;” add the word, “spousal” to the phrase, “support obligation;” insert “by court order” when referring to the spousal support obligation; insert “or former spouse” when addressing the “spouse;” and add “by the department” to the phrase, “being enforced.”

Recommendation 12. Amend SDCL 25-7A-1 definitions of “date of hire” to comply with federal regulations.

Issue. South Dakota’s definition of new hire is not consistent with the federal definition. Consistency is important because the South Dakota Directory of New Hire feeds into the National Directory of New Hires.

Discussion. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 created the National Directory of New Hires (NDNH) and required the development of individual state directories of new hires that feed into the NDNH. Operated by the Federal Office of Child Support Enforcement (OCSE), the primary purpose of the NDNH is to assist state child support agencies with locating parents and enforcing child support orders. For the sake of consistency, OCSE has developed standards for the data reported to the NDNH. The federal definition of "date of hire" is the date a person first provides services for an employer for pay. South Dakota's existing definition provides for this definition but is also broader: it also provides that the date of new hire could be when a person is added to an employer's payroll. The latter is not consistent with federal code.

Recommendation Summary. Strike the phrase in South Dakota's definition of "date of hire" that is not consistent with the federal definition and amend the remaining definition to comply with the federal definition.

Recommendation 13. Amend SDCL 25-7A-56.7, which establishes due process requirements in any subsequent child support enforcement actions, to clarify that it also applies to any subsequent child support modification actions.

Issue. The current statute granting the authority for mailing to the last known mailing address should include modification, but does not.

Discussion. SDCL 25-7A-56.7 provides that in any subsequent child support enforcement action between the parties, and upon sufficient showing that diligent efforts have been made to ascertain the location of a party, the tribunal shall deem due process requirements for notice and service of process satisfied by delivering written notice to the most recent residential or employer address on file with the tribunal.

There is no similar provision for child support modification actions. The Commission believes that due process provisions for child support modification actions should parallel the due process provisions for child support enforcement actions.

Recommendation Summary. Insert “or modification” after “enforcement” to the phrase, “In any subsequent child support enforcement action.”

Recommendation 14. Create two new sections in SDCL 25-7A that address due process protections in child support modification actions.

Issue. It is standard practice among orders established by a referee, Division cases, and other State divisions to require the parties to provide an accurate mailing address to the Division and keep it updated. This facilitates notification of any subsequent child support action. Codifying the practice will enhance due process protections to parties regardless whether their order is enforced by the Division or set by a referee and create greater consistency in notification procedures across the State.

Discussion. One of the Commission members initially drafted the proposal based on discussions at the 2012 annual meeting of the State Bar of South Dakota. The first section of the proposed provision essentially codifies the current, standard practice and mimics the address requirement used by other State divisions and departments. The standard practice consists of a provision placed in each support order that requires each parent to notify the Division of the parent’s current address and the name and address of the parent’s current employer. The standard order also requires each parent to notify the Division of a change in the parent’s address or employment within seven days of the change. Including the parent’s employment address is useful to a diligent effort to make service because if a notice mailed to the parent’s last address is returned, the notice can be mailed to the employer’s address.

The second part of the proposed provision provides that a referee may mail any notice required by SDCL 25-7A-6 and SDCL 25-7A-22 to a parent’s last known address on file with the Division. SDCL 25-7A-6 and SDCL 25-7A-22, respectively, provide that a parent served with a notice of support debt can request a hearing and a parent can object to a petition to modify his or her order.

The Commission devoted considerable discussion to parties who failed to provide the Division with a current address. Although the Division reminds parties of the requirement, the Division also hears from several individuals who claim they did not

receive a notice of hearing. At times, in these situations, the courts have vacated the recent order and remanded the action back to the referee. In all, the general concern is that parties who fail to provide the Division with a current address would essentially be unable to pursue a subsequent modification without a change in circumstances within three years as required by SDCL 25-7A-22. To rectify that potential issue, the Commission considered providing a party who failed to provide a current address with a method to petition for a subsequent order modification without showing a substantial change of circumstances. Such a provision would ease the modification process among parties who failed to provide their address, but it also could be abused by those who did not like the resulting order. They could claim lack of service to initiate a subsequent modification action. The Commission decided against recommending an additional process for those who failed to provide their address. The Commission recognizes that in an issue of unfairness, a party could pursue an action through the circuit court to have the modified order vacated.

Recommendation Summary. Create two new sections in SDCL 25-7A that will enhance due process protections in child support modification actions. One section requires each parent to notify the Division of Child Support of his or her current address, name and address of employer, and any address and employment changes. The other section provides that a child support referee may mail notices to the parent's last known address on file with the Division.

Recommendation 15. Create two new sections in SDCL 25-7A that improve discovery in referee proceedings.

Issue. The Commission heard through referees and other sources that there are an increasing number of requests for continuances in referee hearings to allow a party's attorney to review the other party's financial information that made available for the first time at the initial hearing.

Discussion. Current statute does not address the requirements of discovery in referee hearings. Specifically, it does not provide a mechanism that allows attorneys on both sides to access confidential information prior to the referee hearing, including information

that is provided by the Division of Child Support such as income information from the National Directory of New Hire.

In general, discovery prior to a hearing can help parties achieve a settlement by allowing each party to learn about the other side's facts, such as the other parent's income and financial situation. The current practice in referee hearings consists of an order of reference authorizing the referee to request financial and other relevant information from the parties. Once received, a party's accessibility of the other party's information are limited by SDCL 15-15A-08 through SDCL 15-15A-10, which, respectively, deem the parties' financial documents as confidential documents not accessible to the public, and can only be accessed through a motion showing good cause. Although the intention is to hold information confidential, the unintended outcome is often the hearing is continued because the attorney representing one parent does not know the income evidence provided by the other parent until the date of the hearing.

The Commission believes that a statute providing that the parties must furnish all financial and legal documents required by the referee five days prior to the hearing date is an appropriate solution to this problem. In drafting the recommended statute, the Commission discussed their concerns with such a provision and how these concerns could be addressed. One concern was that some individuals may not be able to provide the information prior to the hearing, while some individuals may intentionally withhold financial information. The Commission does not recommend dismissal of information not submitted five days prior to the hearing date. Instead, the Commission recommends providing that the referee *may* exclude the evidence. This would allow the referee to use his or her best judgment.

Another concern was holding information confidential, particularly when copies are requested by a party who is not represented by attorney. An unrepresented party may not know or appreciate confidentiality requirements as well as an attorney requesting the copies on behalf of his or her client. To avoid this potential problem, the Commission recommends developing a document that would be disseminated to a party requesting the release of the other party's information that explains how the information is to be held confidential, cannot be released for purposes outside of the child support proceeding and that the requesting party could be rendered liable for damages if it is not.

The Commission also reviewed current provisions to protect the confidentiality of address information in cases with protection orders, such as the warning being printed on modification petitions, and found that these provisions also apply when one party requests the financial information of the other party. Still another confidentiality concern was financial information that included income and earnings information of party's current spouse and whether that information should be redacted and if so, who would be responsible for redacting the information. When discussing this concern, the Commission also recognized that the income of the party's current spouse would be relevant to the proceeding if a party was requesting a deviation based on it because it is a permissible guidelines deviation factors. After considerable discussion, the Commission concluded that the best solution would be to provide instructions on the modification paperwork clarifying what information is subject to redaction. In crafting those instructions, the Commission recommends that it mimic the instructions given by the Clerk of Courts for modifications to orders that were established as part of action dissolving a marriage.

Still another issue is the fee for obtaining a copy of the financial documents. The Commission received input that one dollar per page is excessive and that for most situations, twenty-five cents per page and the cost of mailing a requested document, if a mailing is indeed requested, are sufficient.

Recommendation Summary. Create two new sections in SDCL 25-7A that improve discovery in referee proceedings. One section provides that the parties shall provide all financial and legal documents at least five days prior to the hearing date. The other section provides that the parties may inspect and obtain copies of financial documents, that the information is to be held confidential, and that the referee may charge copying fees not to exceed twenty-five cents per page.

OTHER MATTERS ADDRESSED BY COMMISSION

The commission was presented with and discussed many issues brought to their attention that did not result in recommendations. Some issues were outside the scope of the executive order (e.g., custody and visitation issues) and some were not concerns shared by more than one individual. There were only three issues that were within the scope of the review that were identified by more than one individual. Those issues and the Commission's considerations of them are summarized below.

Deviations on Referee's Own Motion. The 2012 Commission, as well as the 2008 Commission, contemplated the appropriateness of allowing referees the authority to raise a deviation upon their own motion. The 2008 Commission recognized that this could be helpful in hearings where the parties represent themselves and do not fully understand the guidelines and deviation criteria, but the 2008 Commission also recognized that this could put a referee in the position where he or she is acting or appearing to act as an advocate or attorney for one of the parents in the case. The 2012 Commission felt that although the referee cannot recommend that a party request a certain deviations, they have the ability to canvas deviations and make parties aware that they are available.

One common concern heard in the 2012 guidelines review was whether it would be appropriate for referees to deviate downward from the guidelines amount because the noncustodial parent cannot find full-time work or does not furnish income information and does not appear to have the ability to earn the annual pay standard. SDCL 25-7-6.10 provides for a guidelines deviation for, "any financial condition of either parent which would make application of the schedule inequitable" and could be applied to these situations. Further, the recommended change to SDCL 25-7-6.26 addresses the issue with the annual pay standard.

Interest on Support Debt or Judgment. The Commission discussed the matter of interest and the waiver of said interest in situations where payment is offered by the noncustodial parent but the custodial parent either refuses to accept the payment or refuses to sign the full satisfaction. The problem occurs when the custodial parent refuses

to sign the full satisfaction, but makes no effort (and in some instances also has no desire) to obtain the interest owed. This results in the judgment not being fully satisfied and may affect the credit rating, interest rates for loans, and ability for the noncustodial parent to secure a loan, due to the judgment. This type of situation was brought up via the public input and is not isolated to one instance.

The Commission discussed whether there was a current remedy in place for this type of situation. Once a judgment is paid in full, and interest has been offered, the custodial parent is currently required to file a satisfaction. If the parent does not do so, the noncustodial parent can take the custodial parent to small claims court and force the parent to file a satisfaction. In addition, attorney fees and filing charges can be requested.

IRS tax credits and deductions. As the result of the 2004 Commission recommendations, the deviation for federal income tax consequences arising from claiming a child as a dependent was repealed. During discussions about this deviation, the 2004 Commission noted inconsistencies among circuit court judges and child support referees in considering the various income tax consequences when calculating a parent's respective child support obligation. Some judges and referees were doing so in virtually every case while others were not considering the tax consequences at all because of the complexity and time consuming nature of doing so. Like the 2004 Commission, this Commission believes that child support obligations must be calculated consistently throughout the state and to the greatest extent possible. The elimination of this deviation had minimal impact upon the parents' actual child support obligation and resulted in a simpler, more consistent child support calculation. In 2009, the IRS redefined custodial parent further clarifying the party eligible to claim the deductions and eligibility for tax credits. This change in IRS policy does have an exception in which a Form 8332 can be filed with the IRS to release a claim to exemption for a child so that the noncustodial parent can claim the exemption. Due to the issues that resulted prior to the repeal of this deviation and the fact that the IRS defines who is eligible for the deductions and tax credits, the Commission chose not to address this issue any further.

APPENDIX A

RECOMMENDED LEGISLATION PROPOSED BY THE COMMISSION

FOR AN ACT ENTITLED, An Act to revise certain provisions relating to child support.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That SDCL 25-7-6.16 be amended to read as follows:

25-7-6.16. The court shall enter an order addressing how the child's health care needs will be met by medical support to be provided by one or both of the parents. The medical support order shall include a provision for medical insurance if the insurance is accessible for the child and available to a parent at reasonable cost. Medical insurance is considered accessible if a medical insurance benefit plan is available and provides coverage for the child residing within the geographic area covered by the insurance policy. Medical insurance is considered reasonable in cost if the cost attributable to the child is equal to or less than eight percent of the parent's net income as determined under this chapter, after proportionate medical support credit is applied, and the amount shall be specified in the order for support.

The cost of the insurance attributable to the child is the cost of adding the child to existing coverage, the difference between self-only coverage and family coverage, or the cost of private medical insurance for the child. The cost attributable to the child under family coverage is the difference between self-only coverage and family coverage divided by the number of individuals, excluding the parent, enrolled in the family coverage. The cost so computed shall be apportioned between the parents on the basis of income or income imputed as provided in this chapter. If one parent pays the entire amount, that parent shall either be reimbursed by the other parent for that parent's portion of the

payment or shall receive a credit against his or her support obligation, whichever is appropriate. Any additional, reasonable health care costs, including medical, optometric, dental or orthodontic, or counseling costs for each minor child which exceed two hundred fifty dollars in any year and are not covered by insurance, shall be apportioned between the parents in proportion to the support obligation of each parent. The parent that has primary physical custody of the child is responsible for the first two hundred fifty dollars of health care costs each calendar year.

Section 2. That SDCL 25-7-6.26 be amended to read as follows:

25-7-6.26. If a parent in a child support establishment or modification proceeding fails to furnish income or other financial information, the parent is in default, and that parent's income for purposes of determining child support shall be computed at a rate not less than the most recent annual pay standard as reported by the Department of Labor and Regulation unless good cause is shown to set support at a lower amount.

Section 3. That SDCL 25-7-7.3 be amended to read as follows:

25-7-7.3. Any ~~past due~~ previously ordered support payments that have become due, whether paid or unpaid, are not subject to modification by a court or administrative entity of this state, except those accruing in any period in which there is pending a petition for modification of the support obligation, but only from the date that notice of hearing of the petition has been given to the obligee, the obligor, and any other parties having an interest in such matter.

Section 4. That Chapter 25-7 be amended by adding thereto a NEW SECTION to read as follows:

When a presumed or legally determined father has a child support order and disestablishes his paternity pursuant to section 18 of this Act, the child support order is automatically terminated from entry of the disestablishment order. The disestablished father continues to be responsible for any child support that accrued prior to the date of entry of the disestablishment order. However, nothing herein precludes the disestablished father from bringing a separate cause of action for recovery of previously ordered child support.

Section 5. That SDCL 25-7A-1 be amended to read as follows:

25-7A-1. Terms used in this chapter mean:

- (1) "Administrative order," a judgment or order of an agency of the executive branch of state government, or an agency of comparable jurisdiction of another state, ordering payment of a set or determinable amount of support money, or ordering withholding of income;
- (2) "Arrearage," the total amount of unpaid support obligations;
- (3) "Assistance," money payments made by the Department of Social Services which are paid to, or for the benefit of, any dependent child, including payments made so that food, shelter, medical care, clothing, transportation, education, or other necessary goods, services, or items may be provided, and payments made to compensate for the provision of those necessities;
- (4) "Court order," a judgment or order of a circuit court of this state or a court of comparable jurisdiction of another state ordering payment of a set or determinable amount of support money;

- (5) "Delinquency," any payment under an order for support which becomes due and remains unpaid;
- (6) "Department," the Department of Social Services;
- (7) "Dependent child," a needy child under the age of eighteen or under the age of nineteen and a full-time student in a secondary school if, before the child attains the age of nineteen, it is determined that the child may reasonably be expected to complete the program at the secondary school, who has been deprived of support or care by a natural parent, an adoptive parent, or a stepparent, by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or who is a child of an unemployed parent and who is living with a person in a place of residence maintained by such person as his home;
- (8) "Income," any form of payment to a person, regardless of source, including wages, salary, commission, bonuses, compensation as an independent contractor, workers' compensation, unemployment compensation, disability, annuity and retirement benefits, gift or inheritance, all gain derived from capital or labor, profit gained through the sale or conversion of capital assets, and any other payments, including personal property, money and credits on deposit with or in the possession of, or made by any person, private entity, federal or state government, any unit of local government, school district or any entity created by public act. However, for the purposes of income withholding, income excludes:
 - (a) Any amount required by law or as a condition of employment to be withheld, other than creditor claims, including federal, state, and local

taxes, social security, and other retirement contributions;

(b) Any amount exempted by federal law; and

(c) Public assistance payments;

- (9) "Need," the necessary costs of food, clothing, shelter, education, and medical care for the support of a dependent child;
- (10) "Obligee," any person or entity to whom a duty of support is owed;
- (11) "Obligor," any person who owes a duty to make payments under an order for support;
- (12) "Order for support," a judgment, decree, or order, whether temporary, final, or subject to modification, issued by a court or an administrative agency of competent jurisdiction, which provides for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing state, or of the parent with whom the child is living, which provides for monetary support, health care, medical support, arrearages, or reimbursement, and which may include costs and fees, interest, and penalties, income withholding, attorney's fees, and other relief;
- (13) "Parent," the natural parent, adoptive parent, or stepparent of a dependent child;
- (14) "Payor," any person or other entity owing income or having personal property or money and credits belonging to an obligor;
- (15) "Person," a natural person, firm, limited liability company, corporation, association, political subdivision, or agency of government;
- (16) "Secretary," the secretary of social services;

- (17) ~~"Spouse," any parent who has legal custody of a child in accordance with a court or administrative order;~~ "Custodian," a person who has either legal or physical custody, or both, of a dependent child;
- (18) "Standard of need," the need established by the Department of Social Services;
- (19) "Support enforcement services," establishing and enforcing support obligations, locating support obligors, and establishing paternity under the Title IV-D state plan;
- (20) "Title IV-D agency," the agency established by Part D of Title IV of the Social Security Act (42 U.S.C. §§ 651 to 667) for the purpose of administering the state's plan for establishing and enforcing support obligations, locating support obligors, and establishing paternity;
- (21) "Medical support," the provision of a health insurance benefit plan or cash medical support payment, including any employer sponsored group health plan or self-insured plan, or any individual health insurance policy, to meet the medical needs of a dependent child including the cost of any premium required by such a health insurance benefit plan, an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other medical costs not covered by insurance;
- (22) "Business day," a day on which state offices are open for regular business;
- (23) "Employee," any person who is an employee within the meaning of chapter 24 of the Internal Revenue Code of 1986, 26 U.S.C. § 3401-3406, as of January 1, 1997;

- (24) "Employer," any person or entity who is an employer as defined in section 3401(d) of the Internal Revenue Code of 1986, 26 U.S.C. § 3401-3406, as of January 1, 1997, and includes any governmental entity and any labor organization;
- (25) "Labor organization," the meaning given the term in section 2(5) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., as of January 1, 1997, and includes any entity or hiring hall which is used by the organization and an employer to carry out the requirements described in section 8(f)(3) of the act;
- (26) "Date of hire," the date a person ~~is added to an employer's payroll to provide services to the employer, or the date a person actually~~ first provides services for an employer for pay, ~~whichever occurs earlier~~;
- (27) "Newly hired employee" or "new hire," any person hired to provide services for an employer and required to provide an Internal Revenue Service W-4 form to the employer, including a person who is rehired, reemployed, or reinstated following thirty consecutive days of termination or layoff even if the person does not provide a new or revised W-4 form to the employer;
- (28) "Recreational or sporting license," any state issued hunting or fishing license.

Section 6. That SDCL 25-7A-3 be amended to read as follows:

25-7A-3. The Department of Social Services is a party in interest and is subrogated to the right of any dependent child or ~~spouse~~ custodian to prosecute or maintain any support action or execute any administrative remedy existing under the laws of this state to obtain reimbursement of public money expended for or on behalf of the child. If a court order, administrative order, or final decree of divorce enters judgment for an amount of support

to be paid by a parent or other responsible person, the department is subrogated to the debt created by such order, and any money judgment shall be in favor of the department.

Section 7. That SDCL 25-7A-4 be amended to read as follows:

25-7A-4. Upon demand by the Department of Social Services, any parent in the state, whose absence from the home is the basis upon which the department is paying public assistance on behalf of a dependent child, shall complete a statement, under oath, of ~~his~~ the noncustodial parent's current monthly income, ~~his~~ the noncustodial parent's total income over the past thirty-six months, the number of dependents ~~he~~ the noncustodial parent is supporting, the amount ~~he~~ the noncustodial parent is contributing regularly toward the support of all children for whom application for assistance is made, ~~his~~ the noncustodial parent's current monthly living expenses, and all other pertinent information to determine ~~his~~ the noncustodial parent's ability to support ~~his~~ the noncustodial parent's children. This section also applies to a parent who owes support to ~~an obligee~~ a custodian who has applied for support enforcement services, and to both ~~obligor~~ the noncustodial parent and ~~obligee~~ the custodian in a petition for modification filed pursuant to § 25-7A-22.

Section 8. That SDCL 25-7A-5 be amended to read as follows:

25-7A-5. The secretary of social services may initiate an action for support by issuing a notice of a support debt, which shall be served without summons or other pleadings on the alleged responsible parent in the manner provided for service of a summons in a civil action or by certified mail, return receipt requested. The notice, whether based on subrogation power of attorney, assignment of a support obligation established by a court, administrative order, or judgment, or based on the furnishing of assistance by the Department of Social Services for any dependent child or ~~spouse~~ custodian, or based on

the obligation fixed by chapter 25-7, or support due to ~~an obligee~~ a custodian or another state who has applied for support enforcement services, shall contain the following statements:

- (1) The name of the dependent child or ~~spouse~~ custodian for whom support is owed;
- (2) The monthly support for which the parent is responsible, including a statement of the debt accrued and accruing, and the monthly payment to be made on the state debt accrued, or due to ~~an obligee~~ a custodian or another state who has applied for support enforcement services, as established by:
 - (a) Subrogation to or assignment of a court or administrative order, judgment or decree establishing a set or determinable amount of child or spousal support; or
 - (b) Payment of assistance by the department for a dependent child or ~~spouse~~ custodian where there is no court or administrative order, judgment or decree;
- (3) A statement that if the parent does not request a hearing within ten days from the day of service, the secretary:
 - (a) Shall request the court enter an order establishing the amount of child support, accrued and accruing, which the parent is responsible for and the amount of the total monthly payment due on the accrued debt to the state, or to ~~an obligee~~ a custodian or another state who has applied for support enforcement services, and on the monthly support obligation;
 - (b) Shall request that the court enter an order for medical support;
 - (c) May request that the court enter an order for genetic testing costs; and

- (d) May request that the court enter an order adjudicating paternity and custody of the child;
- (4) A statement that the parent served with a notice of support debt may, within ten days of the day of service of the notice of support debt, submit a written response to the notice objecting to all or any part of the notice and requesting a hearing;
- (5) A statement that an order entered under subdivision (3) of this section, establishing the payment obligation of the parent is subject to collection action, including an order for income withholding under this chapter, levy and execution under the laws of this state or any other collection actions authorized by law;
- (6) A reference to this chapter;
- (7) A statement that an order for support entered under this chapter is filed with the appropriate clerk of courts and is a lien as provided by law;
- (8) A statement that if the parent has any questions the parent may telephone or visit the nearest department office or consult an attorney;
- (9) A statement that the parent has an obligation to report any change of address or employment to the department; and
- (10) Any other information the secretary finds appropriate.

Section 9. That SDCL 25-7A-20 be amended to read as follows:

25-7A-20. The department shall enforce the support obligation due to a spouse or former spouse who is living with his the dependent child, but only if a spousal support obligation has been established by court order for the spouse or former spouse and the child support obligation is also being enforced by the department.

Section 10. That SDCL 25-7A-21.1 be amended to read as follows:

25-7A-21.1. In any order establishment case, the ~~obligee~~ custodian is limited to a prior-period support obligation or arrearage not exceeding three years before either the date of application with any Title IV-D agency, the date of filing with a court of competent jurisdiction, or the date of a written demand served personally or by registered or certified mail, return receipt requested, upon the ~~father~~ noncustodial parent at ~~his~~ the noncustodial parent's last known address, whichever occurs earlier.

Section 11. That SDCL 25-7A-56.7 be amended to read as follows:

25-7A-56.7. Upon entry of an order for support, each party to any paternity or child support proceeding shall file with the appropriate tribunals as defined in § 25-9B-101 a written statement specifying the party's name, social security number, residential and mailing address, telephone number, driver's license number, and the name, address, and telephone number of any current employers. A tribunal may not accept for filing any order for support unless and until the written statement is provided by each party. The tribunal shall forward the written statement to the state case registry. If the required information is unavailable, the order for support may be filed with the tribunal providing the trial judge certifies in writing on the order that the required information is unavailable. Each party subject to an order for support shall also notify the appropriate tribunals of any changes to this information, as necessary.

In any subsequent child support enforcement or modification action between the parties, and upon sufficient showing that diligent efforts have been made to ascertain the location of a party, the tribunal shall deem due process requirements for notice and service of process satisfied by delivering written notice to the most recent residential or employer address on file with the tribunal.

Section 12. That Chapter 25-7A be amended by adding thereto a NEW SECTION to read as follows:

An order for support shall include a provision requiring each parent to notify the department of the parent's current address and the name and address of the parent's current employer. The order shall also require each parent to notify the department of a change in the parent's address or employment within seven business days of the change. A child support referee may mail any notice required by §§ 25-7A-6 and 25-7A-22 to a parent's last known address on file with the department.

Section 13. That Chapter 25-7A be amended by adding thereto a NEW SECTION to read as follows:

The parties to a child support proceeding under §§ 25-7A-6 and 25-7A-22 shall provide all financial and legal documents required by the referee at least five days prior to the hearing date set by the referee. Failure to provide such information five days prior to the hearing may lead to exclusion of the evidence or the application of § 25-7-6.26.

The parties may inspect and obtain a copy of the financial documents, including confidential information as defined in § 15-15A-8, that are received by the referee in connection with the child support proceeding. This information is to be held confidential and cannot be released for any purpose outside of the child support proceeding. The referee may charge a fee not to exceed twenty-five cents per page for reproducing any document requested. When the actual duplication cost exceeds twenty-five cents per page, the referee may request a court order approving a fee of more than twenty-five cents per page. The referee may also charge for the cost of mailing any document requested by a party.

Section 14. That SDCL 25-8-5 be amended to read as follows:

25-8-5. The ~~mother~~ custodian may recover support for a period of three years before the date of application with any Title IV-D agency, the date of filing with a court of competent jurisdiction, or the date of a written demand served personally or by registered or certified mail, return receipt requested, upon the ~~father~~ noncustodial parent at ~~his~~ the noncustodial parent's last known address, whichever occurs earlier.

Section 15. That SDCL 25-8-7.1 be amended to read as follows:

25-8-7.1. In any action or proceeding in which the parentage of a child is at issue, including disestablishment proceedings pursuant to section 18 of this Act, upon motion of the court, the department, or any of the interested parties, the court shall, for good cause shown, order the mother, the child, or any alleged father to submit to an examination of blood, tissue, or other bodily substances for the purpose of testing any genetic systems that are generally accepted within the scientific community for the conclusive determination of paternity probability. The results of the tests, together with the opinions and conclusions of the testing laboratory, shall be filed with the court. Upon written agreement of the mother and any presumed or alleged father, tests may be conducted prior to filing of an action. If the action is then filed, the test results shall be filed with the court and admitted into evidence as provided in § 25-8-7.3.

Section 16. That SDCL 25-8-9 be amended to read as follows:

25-8-9. Proceedings to establish or disestablish paternity and enforce the obligation of the father may be brought at any time before the eighteenth birthday of the child.

Section 17. That SDCL 25-8-57 be amended to read as follows:

25-8-57. Any child born in wedlock, or born within ten months after dissolution of the marriage, is presumed legitimate to that marriage even if the marriage is subsequently

declared to be null and void, or subsequently dissolved by divorce. This rebuttable presumption of legitimacy can only be disputed by the husband or wife, or a descendant of one or both of them, or a potential biological father of the child. The potential biological father has standing to file an action to rebut this presumption prior to obtaining genetic test results. The potential biological father cannot rebut the presumption without genetic test results meeting the requirements of § 25-8-58 establishing that he is the biological father of the child.

This presumption may be specifically rebutted pursuant to section 18 of this Act.

Section 18. That Chapter 25-8 be amended by adding thereto a NEW SECTION to read as follows:

The court may at any time before the child turns eighteen, find that a presumed or legally determined father is not the biological father of a child, based on genetic test results that either exclude the presumed or legally determined father as the biological father of the child or establish another person as the biological father of the child by the standards set in § 25-8-58. The court may under such circumstances set aside a presumption or prior determination of paternity if it finds that setting aside a presumption or prior determination of paternity is in the best interest of the child. The court may but is not required to consider any of the following factors in determining the best interests of the child:

- (1) the length of time between the proceeding to adjudicate parentage and the time that the presumed or legally determined father was placed on notice that he might not be the genetic father;
- (2) the length of time during which the presumed or legally determined father has assumed the role of father of the child;

- (3) the facts surrounding the presumed or legally determined father's discovery of his possible nonpaternity;
- (4) the nature of the relationship between the child and the presumed or legally determined father;
- (5) the age of the child;
- (6) the harm or benefit that may result to the child if the presumed or legally determined paternity is successfully disproved;
- (7) the nature of the relationship between the child and any presumed or legally determined father;
- (8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and
- (9) any additional factors deemed by the court to be relevant to its determination of the best interest of the child.

Section 19. That SDCL 25-5A-18 be amended to read as follows:

25-5A-18. Upon proof of the notice required by § 25-5A-9 and personal service as required by §§ 25-5A-11 and 25-5A-12 to all parents and putative fathers of a child, if, after the court determines that the parents have consented or have waived consent pursuant to § 25-6-4, the court finds that the termination of parental rights and the transfer of parental rights to be in the best interests of the child, and finds that the petitioner or petitioners are fully aware of the purpose of the proceedings and the consequences of their act, the court shall make an order terminating all parental rights and obligations in the parent or parents in which they have existed and releasing the child from all legal obligations to the parents, even though the proceeding for termination is brought by only

one parent. The court shall also order that the parental rights are transferred to some other person or persons, or authorized agency as may, in the opinion of the court, be best qualified to receive them. The order may contain the power by the person or persons or authorized agency to consent to the adoption of the child, as provided for in § 25-6-12, without further notice to the child's parent or parents or any other person having parental rights over the child. The court may specifically terminate the parental rights of all parents and putative fathers regardless of whether they are personally present in court except as required in § 25-5A-14. Any existing child support arrearages shall be addressed by the court in the order terminating parental rights.

Section 20. That SDCL 25-6-17 be amended to read as follows:

25-6-17. The natural parents of an adopted child are from the time of the adoption, relieved of all parental duties towards, and of all responsibility for the child so adopted, and have no right over it. Adoption of a child shall be final and unconditional except as otherwise provided by § 25-6-21. The natural parents of an adopted child shall retain no rights or privileges to have visitation or other post-adoption contact with the child, except in cases where a natural parent consents to the adoption of a child by the child's stepfather or stepmother who is the present spouse of the natural parent or in cases of voluntary termination where there is a written pre-adoption agreement between the natural parent or parents and the adoptive parents. Any existing child support arrearages shall be addressed by the court in the order terminating parental rights. The South Dakota Supreme Court decision, *People in Interest of S.A.H.*, 537 N.W.2d 1 (S.D. 1995), is abrogated by the South Dakota Legislature in so far as the case gave circuit courts the option to order an open adoption or post-termination visitation. Post-adoption visitation is an extraordinary remedy and may be exercised only by the adoptive parents when in the

child's best interests. This section does not apply to pre-adoption agreements entered into before July 1, 1997.

Section 21. That SDCL 26-8A-27 be amended to read as follows:

26-8A-27. On completion of a final dispositional hearing regarding a child adjudicated to be abused or neglected, the court may enter a final decree of disposition terminating all parental rights of one or both parents of the child if the court finds, by clear and convincing evidence, that the least restrictive alternative available commensurate with the best interests of the child with due regard for the rights of the parents, the public and the state so requires. The court may enter a decree terminating parental rights if the court finds, by clear and convincing evidence, that the parents have abandoned the child for at least six months and during this period the parents have not manifested to the child or to the physical custodian or caretaker of the child a firm intention to resume physical custody of the child and to make suitable arrangements for the care of the child. If the court decides to terminate parental rights, any existing child support arrearages shall be addressed by the court in the order terminating those parental rights.

Upon the entry of the final decree of disposition terminating the parental rights of both parents or of the surviving parent, the court shall vest the Department of Social Services with the custody and guardianship of the person of the child for the purpose of placing the child for adoption and authorizing appropriate personnel of the department to consent to adoption of the child without need for any notice or consent of any parent of the child. The final decree terminating parental rights is final and unconditional. The natural parents retain no post-termination rights or privileges including post-termination visitation except for any final visitation allowed by the department.

Upon the entry of a final decree of disposition terminating the parental rights of one parent, the court may leave the child in the custody of the remaining parent and end the proceedings.